HARVARD

LAW REVIEW.

VOL. XVIII. NOVEMBER, 1904. NO. 1

EQUITABLE CONVERSION.

THE word "conversion" (*conversio*) is derived immediately from the Latin verb *convertere*, which is in turn compounded of the prefix *con-* and *vertere*. *Vertere* means literally to turn or turn round, and, like our verb "turn," it is both transitive and intransitive. As a transitive verb, however, it often means also to change the nature or form of a thing, and it is used in this sense in a great variety of connections; and, when so used, it is synonymous with *mutare*. So, too, our transitive verbs "turn" and "change" are often used synonymously.

The compound verb *convertere*, especially when used transitively, has practically the same meaning as the simple verb, the prefix having little, if any, other effect than that of adding emphasis to the simple verb.

The simple verb *vertere*, as well as most of its derivatives,[1] has been wholly rejected by us, but its numerous compounds, in their transitive signification, and their derivatives have not only been generally adopted, but are in constant use, and full of life and vigor; and this is true of *convertere* and *conversio*. The latter is a verbal noun or noun of action, *i. e.*, it is the name given to the act or action expressed by the verb *convertere*. Thus, when the verb means to turn or turn round, the noun means the act or action of turning or turning round. For example, in logic, a proposition is

[1] Verse, versatile, versatility, and version are exceptions.

said to be converted when its terms are transposed, so that its subject becomes its predicate, and its predicate becomes its subject; and the act of thus transposing the terms of a given proposition is called the conversion of that proposition. Hence also the converse of a given proposition is the same proposition converted, *i. e.*, the same proposition with its terms transposed. So, too, whenever the verb means to change the form or nature of a thing, the act of making the change is called a conversion. Such a conversion may be made in two ways, one of which may be termed direct, the other indirect. It may be made directly, either by the operation of natural laws, as when water is converted into ice by freezing weather, or by artificial means, as when cotton, flax, or wool is converted into cloth by the processes of spinning and weaving, and when iron is converted into steel by any of the processes employed for that purpose. So also land may be converted directly into a chattel by the physical act of severing a portion of the earth from the general mass, as where ore is dug from a mine. A conversion may be made indirectly by exchanging one thing for another, as when land is converted into money by selling the land, and thus receiving money in exchange for it, or (what is still more indirect) when land is converted into railway shares by selling the land for money, and then investing the money in railway shares.

Of these two kinds of conversion, it is chiefly of the indirect that the law takes cognizance.

It is obvious that every exchange of one thing for another is a bilateral or two-sided transaction, as every exchange of money for land (for example) is also an exchange of land for money. Moreover, such an exchange commonly has its origin in a bilateral or mutual contract, between the two parties to the exchange, to make such exchange.

Sometimes, however, the contract is only unilateral, *i. e.*, one of the parties only binds himself to make the exchange, the other having an option to make it or not, until it is actually made.[1] An exchange may also be made without any previous contract of any kind, *i. e.*, the parties may arrange together the terms on which they will make the exchange, and then make it without either one's binding himself to make it. It is in this way that a tradesman commonly sells goods by retail over the counter. So when the owner of property creates a right in another person to have prop-

[1] See *infra*, p. 10.

erty sold to satisfy a lien or charge thereon, but the sale can be made only under a decree of a court of equity, it is necessarily made without any previous contract. To be sure, there are commonly all the forms of a sale by auction, but these forms do not create a contract. What the buyer relies upon is the good faith of the court, and the court relies upon its power to compel the buyer to perform his promise, although the latter is not legally binding.

For the present purpose, however, it may be assumed that every exchange is preceded by a bilateral contract to make the exchange. In order, however, that such a contract may result in an actual exchange, it is plain that one of the parties to the contract must, at the time of making the exchange, be the owner of one of the things to be exchanged, and the other must be the owner of the other, or, if either of them be not such owner, he must be fully authorized by the owner to make the exchange. The owner of a thing may authorize another person to exchange it for something else, either by conferring upon him a power to make the exchange, or by vesting in him the legal title to the thing, with authority to make the exchange, and, in either case, he may confer merely an authority to make the exchange, or he may direct it to be made. It is in one of these two modes that an authority or direction is always given by a will to sell or purchase land. A mere authority to sell or purchase land, whether given by will or otherwise, has little to do with equitable conversion, while a direction by will to do either gives rise to some of the most important questions which the subject of equitable conversion involves. As, therefore, a direction given by will to sell or purchase land is always attended with two peculiarities, it is important that these peculiarities be carefully attended to. In respect to these peculiarities, moreover, there is no difference between a direction to sell or buy land and a mere authority to do so.

The first of these peculiarities is that such a direction does not take effect for any purpose whatever until the testator's death;[1] the second is that, at the moment of the testator's death, all his property devolves upon some one else, either by the effect of his will, or by operation of law, and consequently the land which a testator has directed to be sold will, at the moment of his death, descend to his heir, unless he has devised it to some one else; and

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[1] Sheddon *v.* Goodrich, 18 Ves. 481; Hooper *v.* Goodwin, 18 Ves. 156.

the money with which a testator has directed land to be purchased will, at the moment of his death, devolve upon his executor for the benefit of his next of kin, unless he has bequeathed it to some one who is not his next of kin, and, in the latter case, it will devolve upon the executor for the benefit of the legatee. As, therefore, the sale or purchase of land directed by a testator cannot take place until sometime after his death, it cannot take place until the land to be sold, or the money with which land is to be purchased, has completely changed ownership in the manner just stated. When, therefore, a testator directs a sale or purchase of land after his death, he directs a sale of land which will not then be his, or a purchase of land with money which will not then be his, and hence the question at once arises whether the direction is valid. Before this question can be answered intelligently the effect of such sale or purchase, if actually made, must be ascertained.

When land is exchanged for money or money for land, the first effect is that he who before owned the land becomes owner of the money instead, and that he who before owned the money becomes owner of the land instead, except so far as the money for which the land is exchanged, or the land for which the money is exchanged, is otherwise effectively disposed of, and except so far as the money for which land is exchanged goes to satisfy a charge or charges on the land. Whenever, therefore, any question arises as to who is entitled to the proceeds of a sale of land, for example, the answer generally depends upon the answer to three preliminary questions, namely, 1st, who owned the land when the sale was made; 2dly, how much, if any, of such proceeds goes to satisfy a charge or charges on the land; 3dly, how much, if any, of such proceeds is effectively disposed of by the will.

The second effect of an exchange of land for money, or of money for land, is that he who before was the owner of real estate becomes the owner of personal estate instead[1] and that he who before owned personal estate becomes the owner of real estate instead. If, therefore, he who owned the land before the exchange was made, die the next day after the exchange, the money which he has received in exchange will go to his personal representative, whereas, if he had died the day before the exchange, the land would have gone to his heir. So, if he who before owned the money die the day after the exchange is made, the land which

[1] See Walter *v.* Maunde, 19 Ves. 424.

he has received in exchange will descend to his heir, whereas if he had died the day before the exchange was made, the money would have devolved upon his personal representative. It should be added, however, that this second effect of an exchange, though it is always and necessarily produced at law, is not always produced in equity, for, if a court of equity be of opinion that either party to the exchange ought not to have made the exchange, or that justice requires that the exchange should not produce this second effect as to the money or the land given in exchange, such court may, and sometimes will, reconvert such money into land, or such land into money, in the manner to be hereafter stated, *i. e.*, treat the money, for the purposes of devolution, as if it were land, or the land as if it were money.

The effects produced by an actual exchange of land for money, as stated in the last two paragraphs, are illustrated by the following cases.

Thus, in Flanagan *v.* Flanagan,[1] where a testator devised her land to her father and brother, subject to a charge for payment of her debts, and after the testator's death the father died, and then some of the land was sold under a decree, but it turned out that none of the proceeds of the sale were needed for the payment of debts, one half of such proceeds clearly belonged to the father's heir, though the same was held to belong to his next of kin. On the father's death his one half of the land descended to his heir, and it continued to belong to him till the sale was made. If, however, the sale had been made during the father's life, his one half of the land would thereby have been actually converted into money, and such money would, upon his death, have devolved upon his executor for the benefit of his next of kin. A question was sought to be raised whether, as the sale turned out to be unnecessary, the money ought not to be reconverted by equity into land. No such question, however, was before the court, for, assuming that it would have to be answered in the affirmative, the only effect would be that the father's heir would take it as land, and whether he would take it as money or land would not be material until it devolved from him upon some one else.

So in Ackroyd *v.* Smithson,[2] where a testator devised land to trustees in trust to sell the same, and divide the proceeds

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[1] Cited 1 Bro. C. C. 498.

[2] 1 Bro. C. C. 503.

among fifteen legatees, two of whom died during the testator's life, and after the testator's death the land was sold, the shares of the two deceased legatees in the proceeds of the sale clearly belonged in equity to the testator's heir, the land being his when it was sold, and the shares of the two deceased legatees being undisposed of; and the court so held, though not till after the celebrated argument of Mr. Scott (afterwards Lord Eldon) had induced Lord Thurlow to change his mind, he having announced, before Mr. Scott began his argument, that his opinion was in favor of the testator's next of kin, who claimed the shares of the two deceased legatees against the heir, and who filed the bill to enforce their claim.

Ackroyd *v.* Smithson was soon followed by Robinson *v.* Taylor,[1] where a testator devised his land to his executors in trust to sell the same, and make certain payments out of the proceeds, and pay the interest of the residue to a person named for life. The land was sold accordingly, and, on the death of the legatee for life, Lord Thurlow held that the principal of such residue went to the testator's heir, though the same was claimed by his next of kin.

So in Dixon *v.* Dawson,[2] where a testator devised all his land to trustees to be sold to satisfy certain charges, and the same was sold accordingly, and produced a surplus, and the sale was held to have been properly made, it was also properly held that such surplus belonged to the heir, but that, the sale having been made in his lifetime, the surplus was money in his hands, and so devolved on his personal representative.

In Wilson *v.* Coles,[3] where land was directed by will to be sold, and the only valid gift of the proceeds of the sale was to the testator's wife for her life, and the testator died in 1841, leaving two co-heirs, one of whom died in 1843, and the land was sold in 1857, and the wife died in 1859, it seems clear that the heir of the deceased co-heir was entitled to the latter's one half of said proceeds, though the court gave the same to her personal representative. On the testator's death the legal title to the land passed to the devisees in trust, but the equitable title descended to the two co-heirs, on the death of one of whom her one half of the land descended to her heir, in whom it remained until the sale, when the interests of all persons concerned were converted for all

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[1] 2 Bro. C. C. 589.
[2] 2 Sim. & S. 327.
[3] 28 Beav. 216.

purposes into money. Until the death of the wife, the interests of the two co-heirs and of the heir of the deceased co-heir were of course reversionary.

If a mortgaged estate be sold by the mortgagee, under a power of sale contained in the mortgage deed, any surplus which is produced by the sale will belong to the mortgagor. Why? Because he was in equity the owner of the estate when the sale was made, the mortgage being a mere charge. If, however, the mortgagor die before the sale, still being the owner of the estate, and then the sale be made, the surplus will belong to the heir or devisee,[1] though, if he had died after the sale, it would belong to his executor.[2]

The real estate of a bankrupt, though its legal title passes to his assignees, still belongs in equity to the bankrupt, subject only to the lien of his creditors, so long as it remains unsold. If, therefore, it be sold by the assignees during the bankrupt's life, any surplus will belong to the latter, and, on his death, will go to his personal representative, but, if it be sold after the bankrupt's death, any surplus will belong to his heir.[3]

If a settled estate be subject to a mortgage which antedates the settlement, and the estate be sold to satisfy the mortgage, and produce a surplus, such surplus will belong to the persons to whom the equity of redemption belonged when the sale was made, *i. e.*, it will follow the limitations of the settlement.[4]

If settled land be taken by the state for public uses the effect will be the same as if the land had been sold to satisfy a prior charge, as the title acquired by the state will override all the limitations in the settlement, and therefore the money which the state pays for the land will be subject to all those limitations, just as the land was before the state took it.[5]

If a settled estate be sold under a power, whether the power be created by the settlement, or afterwards by private act, the sale being made with a view to reinvesting the proceeds in other land, such proceeds will, immediately upon the sale's being made, follow all the limitations of the settlement, and that too whether the

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[1] Wright *v.* Rose, 2 Sim. & S. 323; Bourne *v.* Bourne, 2 Hare 35; Gardner's Trusts, *In re*, 1 Equity Reports, 57.

[2] Mary Smith's Mortgage Account, *In re*, 9 W. R. 799.

[3] Banks *v.* Scott, 5 Madd. 493.

[4] See Jones *v.* Davies, 8 Ch. D. 205.

[5] Horner's Estate, *In re*, 5 De G. & Sm. 483.

instrument creating the power directs the proceeds of a sale to be reinvested in land or not.[1]

In each of the three preceding cases, if the settlement does not exhaust the entire fee-simple in the land, the ultimate reversionary interest in the money which has been substituted for the land will vest in the person or persons in whom the ultimate reversion of the fee-simple in the land was vested when the latter was converted into money.

In Jermy *v.* Preston[2] by a marriage settlement, dated Oct. 4 and 5, 1751, land was limited to the intended husband for life, remainder to trustees for five hundred years, remainder, in the events which happened, to the husband in fee. The trust of the term was to raise £5000 for the intended wife on the death of the husband. The husband died in January, 1752, having devised the land to the wife for life, remainders over. Afterwards the trustees of the term sold a part of the land for the said term for the purpose of raising the £5000, and the sale produced a surplus, which was paid into court, and had there remained ever since. The wife received the income of this surplus until her death, November 18, 1791, since which time, a period of more than fifty years, the income had accumulated, and the question was to whom did the principal and accumulated income now belong, on the supposition, 1st, that it was money in equity as well as in fact, 2dly, that it was land in equity? On each supposition the total product of the sale, from the moment of its receipt by the trustees, followed the limitations in the husband's will, subject to the payment of the £5000. The five hundred year term was, in the events which happened, and subject to the payment of the £5000, held in trust for the husband, he being the owner of the reversion expectant on the termination of that term. The only effect of the term in equity was, therefore, to create a charge on the land of £5000, and though in strictness of law this charge extended only to the term, yet for all practical purposes it extended to the entire fee-simple. Indeed, a charge so created differs practically from an ordinary charge on land, created by the will of its owner, only in this, namely, that the former will bind the land even in the hands of a purchaser for value without notice, while the latter will bind it only so long as it remains in the hands of the person who created the charge, or of the person or persons claiming under him, who received the land without paying value for it or with notice of the charge. By the

[1] Duke of Cleveland's Settled Estates, *In re*, [1893] 3 Ch. 244. [2] 13 Sim. 356.

husband's will, therefore, not only the legal reversion, expectant on the termination of the term, but also the equitable ownership of the term itself passed to his devisees, subject to the charge. Consequently, when the sale was made, the money produced by it belonged to the same devisees, subject to the same charge, and, when the latter was paid off, the surplus which remained still belonged to the husband's devisees. Accordingly, as the wife had, by her husband's will, a life interest in the land sold, she rightfully received the income of the surplus money during her life. On her death the ultimate remainder in fee, created by her husband's will, vested in possession, and hence the owner of that remainder then became the absolute owner of said surplus, whether it had the quality of money or land. If it had the quality of money, it henceforth devolved as money, while, if it had the quality of land, it devolved as land. The court held that it had the quality of land, whether rightly or not, I shall inquire hereafter.

If land which is exchanged for money belong to two or more co-owners, the money received in exchange will belong to them respectively in the same proportions as the land did before. If, however, the land belong (for example) to A for life, remainder to B in fee, the interest of each will be separate and distinct from that of the other, as if A owned Black Acre and B owned White Acre, and therefore, though they join in making a sale, A will be entitled to so much of the money as represents his life estate, and B will be entitled to the remainder.[1] But if the land be held by a trustee for A and B, and be sold by the trustee, he will hold the money as he held the land, namely, for A for life, and then for B absolutely.

There is one notable exception to the rule that when land is exchanged for money the money belongs to the person who owned the land when the exchange was made; for, when an ordinary bilateral contract is made for the sale and purchase of land, and, pending the contract, the vendor dies, and then the contract is performed, the land will have to be conveyed to the purchaser by the vendor's heir or devisee to whom it will have devolved on the vendor's death, and yet the money will have to be paid to the vendor's executor. Why is this? Primarily, it is because the land of a deceased person devolves upon his heir or devisee, while his personal estate, including his *choses en action*, devolves upon his executor. Consequently, when a vendor dies, pending a contract

[1] Pedder's Settlement, *In re*, 5 D. M. & G. 890.

for the sale of his land, the land will devolve on his heir or devisee, and he alone therefore can convey it to the purchaser, while the contract, in respect to the right which it confers upon the vendor as well as the obligation which it imposes upon him, devolves upon his executor, and therefore he alone is entitled to receive the money from the purchaser. Yet, if the executor attempt to enforce the contract at law, he will encounter an insuperable obstacle, for he cannot show a breach of the contract by the purchaser without showing, on his own part, ability, willingness, and an offer to convey the land on receiving the money, and that, of course, he cannot show. His only remedy, therefore, is a bill in equity for specific performance, and equity permits him to file such a bill against the purchaser, making the vendor's heir or devisee a co-defendant, and a decree is made against each defendant, namely, that the purchaser pay the money to the plaintiff on receiving a conveyance of the land, and that the heir or devisee convey the land to the purchaser on his paying the money to the plaintiff; and, though the plaintiff does not accomplish this result on the strength of his legal right alone, yet the only principle of equity which he has to invoke is the principle that the vendor's heir or devisee, not being a purchaser for value of the land, stands in the shoes of the vendor, and so must perform his contract to convey the land.

As the vendor's executor may file a bill against the vendee, making the vendor's heir or devisee a co-defendant, and have a decree as stated above, so, of course, the vendee may file a bill against the vendor's heir or devisee, making the executor a co-defendant, and have a decree that the heir or devisee convey the land to the plaintiff on his paying the money to the executor.

The foregoing exception has, however, been unwarrantably extended to a class of cases to which it is not at all applicable, namely, to cases in which an owner of land gives to another person an option of purchasing the land at a certain price and within a certain time, and dies, pending the option, and then the option is exercised and the land conveyed: for it has been held that, while the land has devolved upon the heir or devisee of the deceased, and so must be conveyed by him, yet the money must be paid to the executor.[1] In short, it has been held, as to the point now under

[1] Lawes *v.* Bennett, stated by Lord Eldon in Ripley *v.* Waterworth, 7 Ves. 436, and afterwards reported in 1 Cox 167; Townley *v.* Bedwell, 14 Ves. 591; Collingwood *v.*

consideration, that there is no difference between an unilateral contract giving an option of purchasing land, and the ordinary bilateral contract for the sale and purchase of land. There is, however, this very important and radical difference between these two species of contract, namely, that in the latter the vendor is not only under an obligation, but also has a correlative right, his obligation being to vest in the purchaser a good title to the land on receiving the purchase money, and his right being to receive the purchase money on performing his obligation, while in the former the giver of the option, though he is under an obligation, has no right whatever. There is this difference, moreover, between the obligations incurred in the two cases, namely, that the obligation of a vendor is generally subject to no condition, except that of a concurrent performance by the purchaser of the obligation resting on him (the performance of which obligation is a condition implied by law),[1] while the obligation incurred by the giver of an option is subject to the condition of the concurrent payment of the purchase money, — which is a condition pure and simple, and which is either express or implied in fact.[2]

A notion seems to have prevailed that, when an option of purchasing land has been given, the receiver of the option becomes bound as soon as he decides to avail himself of the option, and notifies the giver of the option that he has so decided. This, however, is assuming that an option, instead of being an unilateral contract, is an offer to make a bilateral contract, and that the giving of notice as above is an acceptance of the offer, and so completes the contemplated bilateral contract. An option, however, being an unilateral contract, can never become a bilateral contract,

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Row, 26 L. J., Chan. 649; Weeding *v.* Weeding, 1 J. & H. 424; Isaacs, *In re*, [1894] 3 Ch. 506.

In Drant *v.* Vause, 1 Y. & Coll. C. C. 580, Emuss *v.* Smith, 2 De G. & Sm. 122, Walker, *Ex parte*, 1 Dr. 508, and Edwards *v.* West, 7 Ch. D. 858, the court declined to follow Lawes *v.* Bennett, holding it not to be applicable, though it seems very doubtful whether the decision in either of them was consistent with Lawes *v.* Bennett. In *In re* Adams and the Kensington Vestry, 27 Ch. D. 394, the court also declined to follow Lawes *v.* Bennett, though without disapproving of it, and in truth Lawes *v.* Bennett was not there an authority for either party, the question before the court being a wholly different one, namely, whether the right created by a contract giving an option devolves in equity, on the death of its owner, upon his heir or personal representative, — a question which will be considered hereafter.

[1] See my Summary of Contracts, s. 32. I shall not apologize to the reader for referring him to this little book while discussing the subject of "Options."

[2] See *idem*.

and therefore differs entirely from an offer,[1] and here it is assumed that it is an "option," and not an "offer," that we are dealing with. An option, then, being a conditional unilateral contract, a notice by the receiver of the option that he avails himself of it is, if it have any legal significance, the performance of a condition pure and simple. Moreover, while the giver of an option may with propriety require such a notice to be given, he will not be entitled to have it given unless he expressly require it by the terms of his contract, *i. e.*, the giving of such a notice can be only an express condition;[2] nor can it be the only condition of such a contract, for, if it were, its performance would enable the receiver of the option, while himself remaining perfectly free, to compel the giver of the option to convey the land, not only without receiving the purchase money, but without having any remedy for recovering it. The concurrent payment of the money must, therefore, be a further condition, and that too by a necessary implication of fact, if it be not express.[3]

When, therefore, an option is exercised after the death of the person giving it, how can his executor obtain the money which the person exercising the option must pay in order to get the land?

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[1] My Summary of Contracts, written twenty-five years ago, contains, at section 179, the following passage: "Care must be taken to observe a distinction which is apt to be lost sight of. There is no doubt that A may make a binding promise to sell certain property to B on certain terms, while B is left perfectly free to buy the property or not; and such a promise will, in most respects, confer the same rights upon B as if he had made a counter-promise to buy. But such a case differs materially from that of a mere offer to sell property. It is not an offer contemplating a bilateral contract, but it is a complete unilateral contract. All that remains to be done is for B to perform the condition of the promise by paying the price, and for A to perform the promise. The contract will remain unilateral until it is performed, or otherwise comes to an end. Of course A and B together can at any moment substitute for it a bilateral contract, but they cannot strictly convert it into a bilateral contract; still less can this be done by an act of B alone. Even if B should subsequently make a binding promise to buy the property, the result would not be a bilateral contract, but two unilateral contracts; the two promises would not be the consideration of each other, and each would have to be supported by some other sufficient consideration." In Emuss *v.* Smith, 2 De G. & Sm. 722, 735, Knight Bruce, V. C., said: "How this case would have stood if the contract of 1838 had been an absolute or ordinary contract of sale, binding one party to sell and the other to buy, and not, as it was, a contract resting merely in the option of the person with whom the testator entered into the contract, it remaining uncertain, during the whole of the testator's life, whether the purchase would ever take place or not, I need not say."

[2] See *idem*, s. 32.

[3] *Ibid.* See also Weeding *v.* Weeding, 1 J. & H. 424, and in *In re* Adams and the Kensington Vestry, 27 Ch. D. 394, in each of which the payment of the money was made an express condition.

The deceased had no rights whatever under the contract, nor has his executor. The person exercising the option pays the money voluntarily, and his only inducement to pay it is his desire to obtain the land. Why then should he pay it to the executor of the deceased? Such a payment will not help him to get the land. Moreover, if he pays it to the executor, he cannot pay it to any one else, and yet he must pay it to some one else in order to get the land, namely, to the heir or devisee of the deceased. Why? Because the latter owns the land, and can alone convey it. Will equity compel him to convey it on receiving the money? Yes. Why? Because, having received it from the deceased without paying any value for it, equity regards him as standing in the shoes of the deceased, and as subject, therefore, to the same obligation in equity to convey the land to which the deceased was subject at law. Can equity compel the heir or devisee to convey the land without payment to him of the money? No. Why not? Because it could not have compelled the deceased to convey it without payment of the money to him, and to compel the heir or devisee to do so would be to hold him to be under a greater obligation in equity than the deceased was under at law, *i. e.*, to be bound absolutely, while the deceased was bound only conditionally.

How is it then that the courts have held that the executor, and not the heir or devisee, is the person who is entitled to the money? The first answer is that the courts have never so held until the contract has been carried completely into execution by the payment of the money to the heir or devisee, and the conveyance of the land by him. The second answer is that, when the contract has thus been carried completely into execution, the courts have held that the executor is entitled to receive the money from the heir or devisee. Upon what theory is this? It can be only upon the theory that the money, when paid in exchange for the land, is a part of the personal estate of the deceased, and that can be only upon the theory that the exercise of the option relates back to the time when the contract giving the option was made; and accordingly it is upon that ground that the courts have generally sought to vindicate their decisions. Nothing, however, could show more conclusively that these decisions have no solid ground to rest upon than the fact that they can be supported by no better argument than this. The doctrine of relation is a legal fiction, and a court can be justified in proceeding upon a fiction only when it is necessary for the purposes of justice, or at least when the fiction is

promotive of justice. *In fictione juris semper aequitas existit.*[1] If, however, the decisions in question are to be taken as representing the doctrine, this maxim ought to be so modified as to read, "*In fictione juris semper iniquitas existit*"; for the reader will observe that, up to the time when the money is paid and the land conveyed, the executor has no right whatever either to the money or the land, and yet the moment that the money is exchanged for the land, and the land for the money, the executor, though not a party to the exchange, nor in any way concerned with it, is, according to these decisions, entitled to the money, not merely in equity, but at law as well, for, as to such a right, there is no difference between law and equity.[2]

It may be added that the doctrine of relation involved in these decisions proves too much, for it proves that, if a rent be granted in fee-simple out of certain land subject to a perpetual right in the owner of the land for the time being to purchase the rent on certain terms, and, at the end of five hundred years, such purchase be made, the money will belong to the personal representative of him who granted the rent.[3]

It is commonly assumed that the effects produced by an exchange of money for land are the same, *mutatis mutandis*, as those produced by an exchange of land for money, and that the effects would be absolutely the same, but for the fact that, when a person dies intestate, his money and land devolve upon different persons. In truth, however, there are other differences between money and land, in respect to their devolution, which are of much greater legal importance than the fact that they devolve upon different persons. It is often assumed, also, that the heir and next of kin of a person who dies intestate are true analogues of each other, while, in truth, there is no person who occupies in respect to personal estate the position occupied by the heir in respect to land. When a person dies intestate as to his land, the same descends instantly and by operation of law to his heir, who becomes the owner of it absolutely and for his own benefit, while the personal property of one who dies, whether testate or intestate, instantly and by opera-

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[1] See my Summary of Contracts, s. 7.

[2] When the option is given by will, the courts do not hold that the exercise of the option can relate back to a time prior to the testator's death. *In re* Goodall, 65 L. J., Chan. 63.

[3] See Graves's Minors, 15 Irish Chan. 357, where a rent was granted in 1709 and redeemed in 1862.

tion of law, devolves upon his executor or administrator, who becomes the absolute owner of it both at law and in equity, though only in his official capacity, and not for his own benefit. For whose benefit, then, does he hold it? First, for the benefit of the creditors of the deceased, *i. e.*, subject to their right to have their debts paid out of it; secondly, for the benefit of the legatees of the deceased, so far as he dies testate; thirdly, for the benefit of the next of kin of the deceased, *i. e.*, the persons pointed out by the Statute of Distributions,[1] so far as he dies intestate. What are the benefits to which legatees and next of kin are entitled? First, specific legatees are entitled to receive the specific articles given to them, unless their sale shall be necessary for the payment of debts; secondly, pecuniary legatees are entitled to receive the amount of their respective legacies in money, if the assets are sufficient to pay them after creditors and specific legatees are satisfied; thirdly, the residuary legatees or next of kin, as the case may be, are entitled to be paid in money any residue which remains, and for that purpose to have all the assets turned into money. It will be seen, therefore, that no legatee or next of kin can ever become owner of any part of the personal estate of the deceased, except through his executor or administrator, and that a specific legatee alone is ever entitled to become owner of any specific part of the personal estate of the deceased. When does a specific legatee become the actual owner of the thing specifically bequeathed to him? Only when the executor or administrator delivers it to him, or assents to his receiving it, and thus relinquishes his right to sell it for the payment of debts. How does the law secure to legatees and next of kin the benefits to which they are entitled? In case of legatees, by making it the duty of executors and administrators to do whatever legatees are entitled to have done, — which duty equity will require them to perform specifically. In respect to next of kin, the Statute of Distributions imposes a similar duty, and with similar consequences. Moreover, wherever a duty is imposed upon an executor or administrator in favor of legatees and next of kin, of course a correlative right is conferred upon the legatees or next of kin, and it is by virtue of this correlative right that the performance of the duty is enforced.

Suppose, then, a testator directs his executor to invest his residuary personal estate in land, and to settle the land on certain

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[1] 22 & 23 Car. II., c. 10.

persons for their lives, with remainders to their respective sons successively in tail male, and that the executor does as thus directed, the land purchased being conveyed to him in fee-simple by the seller, and then being conveyed by him according to the direction in the will. Of course, the ultimate reversion in fee-simple, not having been disposed of by the testator, will remain in the executor, and will be held by him for the benefit of the testator's next of kin. If, then, all the tenants for life die without issue, all the limitations of the settlement will be exhausted, and the executor's reversion will become a fee-simple in possession, and the executor will still hold the same for the benefit of the next of kin. What, then, will be the rights of the latter? Simply to have the land sold by the executor and its proceeds divided among them according to the Statute of Distributions. Of course, it will be open to them to make an arrangement with the executor to convey the land to them, instead of selling it, but they will have no right to require him to convey it to them. If, then, one of the next of kin die intestate at any time between the original purchase of the land by the executor and the sale of it by him, how will his right devolve? Of course, it will devolve only as personal estate, as it is only a right to receive a sum of money, and so it was held to devolve by Sir W. Page Wood, V. C. (afterwards Lord Chancellor Hatherley), when the question arose before him, and for the first time, in Reynolds *v.* Godlee.[1] His decision was, however, afterwards overruled by Sir G. Jessel, M. R.,[2] who held that the land itself belonged to

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[1] John. 536, 582.

[2] Curteis *v.* Wormald, 10 Ch. D. 172. The judgment of Sir G. Jessel in this case, the facts of which are substantially those supposed in the text, contains one or two things which require to be noticed. According to the report the testator directed his trustees, and not his executors, though the same persons were both executors and trustees, to invest his residuary personal estate in land, and upon this Sir G. Jessel remarks: (174) "A testator directed his trustees — for, although the same persons may have been appointed executors, they are for this purpose trustees and trustees only — to lay out his residuary personal estate in the purchase of real estate." He afterwards says: (175) "The executors have ceased to have anything whatever to do with the matter. They have paid over the legacy to the legatee, who happens to be a legatee-trustee, and who holds it by law under the Statute of Distributions, as trustee for the next of kin, and no one else." These statements are surprising. If the will had disposed of personal estate only, there would have been no possible reason for appointing trustees, nor is there the slightest reason to suppose that any would have been appointed. The will began, however, with devising the testator's real estate in strict settlement, and, having been made in 1818, it doubtless contained the usual limitations to trustees to support contingent remainders; and the fact of there being trustees is thus accounted for. The use of the word trustees by the testator, however, in connection with his personal

the next of kin in equity, and hence devolved as land, and his decision was affirmed by the Court of Appeal in Chancery. I am, however, bound to express the opinion that Sir W. Page Wood was right, and that Sir G. Jessel and the Court of Appeal in Chancery were wrong.

There is, however, one argument in favor of the decision in Curteis *v.* Wormald which, as it was not alluded to by Sir G.

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estate was evidently a mistake, and should have been disregarded. The testator made no bequest of his personal estate to the trustees, nor could he have bequeathed it to the trustees as such, as it would already be in them in another character by operation of law from the moment of the testator's death, and must remain in them in that character until it was fully administered, and it had not been fully administered when the case was decided. How Sir G. Jessel gets it into the hands of the trustees as legatees, he does not explain. His object, however, in seeking to accomplish that result is plain enough, for he seeks to show that, when the executors have paid over the residue of the personal estate to themselves as trustees, they will have completed their administration of the estate and become *functi officio*, and that henceforth they will hold first the money and then the land as trustees for the next of kin, subject of course to the limitations of the settlement which the will directs. The administration of an estate is not completed, however, until the property has all gone into the hands of persons who own it absolutely. If, therefore, a part of the estate goes into the hands of a person who has a limited interest in it only, the consequence will be that the ultimate reversion will still be a part of the testator's estate unadministered, and will therefore be vested in his executor as such, and consequently, when that limited interest expires, the property must return to the possession of the executor in order that he may complete his administration of it. Even assuming, therefore, that Sir G. Jessel succeeded in getting the residue of the personal estate out of the hands of the executors as such and into the hands of the same persons as trustees, and that the latter acquired such residue absolutely at law, the result would be only a useless circuity, as there would be an immediate resulting trust of such residue to the executors, subject only to the limitations of the settlement. In short, the trustees in their character of trustees cannot be trustees for the next of kin, for they must be trustees for themselves as executors. (For this absurd phraseology Sir G. Jessel is himself responsible.) There is, however, another objection to the trust which Sir G. Jessel seeks to establish, namely, that the next of kin cannot be the *cestuis que trust* in such a trust. By next of kin Sir G. Jessel means (and properly so) next of kin as such, *i. e.*, as creatures of the Statute of Distributions, and next of kin in that character have only such rights as the Statute gives them, and the only right which the Statute gives them is the right to require the personal representative of the deceased to perform the duties which the Statute imposes upon him as such.

The Statute of Distributions was passed at a time when the administration of the estates of deceased persons was within the exclusive jurisdiction of the spiritual courts, the jurisdiction now and for a long time past exercised by courts of equity not having been assumed till a later period. Accordingly the Statute makes not the slightest reference to courts of equity nor to the subject of trusts, — a subject as entirely foreign to the spiritual courts as it is to courts of common law. So far as regards the matters now under consideration, the Statute simply lays its commands on the personal representative of the deceased and directs the spiritual courts to see that those commands are obeyed.

Jessel nor by the judges of the Court of Appeal, I have not yet mentioned, but which it is proper that I should now state and briefly consider.

Prior to the Statute of Distributions, executors owed no duty except to legatees, and if anything remained after debts and legacies were paid the executor was entitled to retain it for his own benefit. Nor was any change made in that respect by the Statute of Distributions, as that Statute applied only to administrators. After courts of equity, however, had assumed that jurisdiction over the estates of deceased persons which they have ever since exercised, they soon became impressed with the injustice of permitting executors to reap the benefit of every failure by their testators to make an effective disposition of their residuary personal estate, and felt themselves authorized to follow the analogy of the Statute to the extent of requiring executors to distribute among the testator's next of kin any residue of his personal estate which was not effectively disposed of, whenever they could find in the will evidence to show that the testator did not intend any such residue to go to the executor for his own benefit; and, finally, in 1830, by the Statute of 11 Geo. IV. & 1 Wm. IV., c. 40, the burden of proof was shifted from the next of kin to the executor, the Statute declaring that the next of kin shall be entitled to any residue of the personal estate which is undisposed of, unless it shall appear by the will that the executor was intended to take such residue beneficially. While, however, the courts of equity followed the analogy of the Statute in the relief which they gave, they acted inconsistently with the Statute in their mode of giving such relief, for, instead of simply directing executors to distribute such residue among the next of kin, they declared them to be trustees of such residue for the next of kin, and 11 Geo. IV. & 1 Wm. IV., c. 40, followed in the footsteps of the courts.

Does then this Statute prove that in Curteis *v.* Wormald the executors ever held the land purchased by them, or the ultimate reversion therein, not as executors, but as trustees? For, if it does, and if, during the time that they so held it, one or more of the persons died who were then entitled to a share of the testator's residuary personal estate, it will follow that any person so dying was at the time of his death a *cestui que trust* of such land, and that his interest as such descended to his heirs, unless the deceased had disposed of it otherwise by his will. It is submitted, however, that the question just put must be answered in the negative.

1. There is no pretense for saying that the executors held the land in question in any different character from that in which they held all the residuary personal estate. 2. The Statute must be so construed, if possible, as not to make any change in the *office* of executor. 3. It must therefore be so construed, if possible, as not to change the character in which an executor holds the residuary personal estate at an earlier date than that at which the testator himself could have directed such a change to be made. 4. A testator cannot direct that his executor shall cease to hold his residuary personal estate as executor, and thenceforth shall hold the same as trustee, until the estate shall have been fully administered. 5. An estate is not fully administered until all the specific property has been converted into money, except such articles as have been specifically bequeathed or such, if any, as have been taken by the residuary legatees or next of kin by mutual arrangement between them and the executor. 6. The purposes of the Statute will be entirely satisfied by holding that an executor ceases to hold an undisposed of residue as executor when it has all been converted into money, its amount precisely ascertained, and when it has consequently become his duty to pay it over to the next of kin.

It may be added that the relation of trustee and *cestui que trust* can never exist between an executor as such and any other person or persons whatever, and therefore that the next of kin in Curteis *v.* Wormald were not *cestuis que trust* of the land in question, if such land was still held by the executors as such. It may also be added that a trustee as such never has power in equity to sell land, unless such power be actually conferred upon him by the creator of the trust; and therefore, according to the decision in Curteis *v.* Wormald, the executors, in their character of trustees, had no power to sell the land in question for the purpose of dividing the proceeds of the sale among the next of kin, however necessary a sale might be.

Returning now to the rule stated at page 4, it follows from thence that, if a testator's land be sold after his death, pursuant to a direction or under a power contained in his will, the proceeds of the sale will, except so far as they go to satisfy a charge or charges on the land,[1] or are otherwise effectively disposed of by the will, belong to the testator's heir or devisee both at law and in

[1] Randall *v.* Bookey, Ch. Prec. 162, 2 Vern. 425; Stonehouse *v.* Evelyn, 3 P. Wms. 252.

equity; [1] and if such land be sold by a trustee to whom the testator has devised it with a direction or authority to sell it, the proceeds of the sale will, subject to the qualifications just stated, belong to the testator's heir in equity, though they will belong to the trustee at law. It is plain, therefore, that a testator has the power to direct or authorize a sale of his land after his death only for the purpose of making some disposition of the proceeds of the sale, or of some part thereof, or of satisfying some charge or charges on the land, either already existing or created by the will; for, in the absence of any disposition of the proceeds of the sale, and of any charge to be satisfied out of them, they, as well as the land, will belong wholly to the testator's heir or devisee,[2] and therefore such heir or devisee alone can make an effective sale of it, or confer an effective power or authority to sell it, and any attempt by the testator to direct or authorize its sale will be invalid and inoperative.[3] If, on the one hand, the testator in terms

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[1] In Pickering *v.* Lord Stamford, 3 Ves. 492, 493–494, Lord Loughborough said: "Neither an heir at law, nor by parity of reason next of kin, can be barred by anything but a disposition of the heritable subject or the personal estate to some person capable of taking. Notwithstanding all words of anger and personal dislike applied to the heir, he will take what is not disposed of. It is impossible to make a different rule as to the personal estate with regard to what is not disposed of."

[2] Therefore the three farms in Carter *v.* Haswell, 26 L. J., Chan. 576, belonged absolutely to the testator's sister, and hence there was no authority to sell them.

[3] It seems, therefore, that the trust for selling the land was invalid and inoperative in *In re* Gordon, 6 Ch. D. 531.

In Cook *v.* Duckenfield, 2 Atk. 566, Lord Hardwicke said (p. 568): "If a testator says, 'I will my heir shall sell the land,' and does not mention for what purpose, it is in the breast of the heir at law whether he will sell it or no, but when the testator appoints an executor to sell, his office shows that it is intended to be turned into personal assets, without leaving any resulting trust in the heir." It will be seen, therefore, that Lord Hardwicke admits that the direction to sell will be invalid if a consequence of a sale will be that the proceeds of the sale will belong to the heir. He is of opinion, however, in accordance with the notions which then prevailed, that the question whether such proceeds did belong to the heir, or went to the executor as a part of the testator's personal assets, depended upon the testator's intention, and accordingly he was of opinion that the fact of the testator's directing his executor to make the sale showed the latter to be his intention. This opinion, however, as to the efficacy of the testator's intention is clearly no longer law. It implies that a testator may give to the sale of his land, made after his death, the same effect that a sale by him in his lifetime would have had.

In Chitty *v.* Parker, 2 Ves. Jr. 271, a testator devised her land and personal estate to be converted into money, but made no gift except of pecuniary legacies, and all these were paid out of the personal estate, out of which they were primarily payable, and hence the land was not sold, and the court held that the land went to the heir as land: There was clearly no right in any one to have it sold. The bill was filed by the next of kin against the heir and was dismissed. The case of Maugham *v.* Mason, 1 Ves. & B.

confer a mere power to sell his land, his act will be a nullity, and any sale which may be made under it will confer no title upon the purchaser. If, on the other hand, the testator devise the land to a trustee in trust to sell it, though the devise will be valid, and will vest the legal title to the land in the trustee, yet the trust sought to be created will be void, and the trustee will become, from the moment of the testator's death, a mere depositary of the legal title, which he will hold for the benefit of the heir, whose servant he will be. He will have no power or authority over the land in equity, and the only obligation resting upon him will be to convey the legal title as the heir shall direct. The heir will not even have the option of calling upon the trustee to make a sale of the land according to the testator's direction. In short, the relation between the heir and the trustee will be the same as that which was created by the ancient use between the *cestui qui use* and the feoffee to uses. Such is always and necessarily the relation which exists between a trustee and a *cestui qui trust* who is in equity the absolute owner of the trust property, and *sui juris*.

There is also another reason why a direction by a testator to sell land is not valid unless he also make some disposition of the proceeds of the sale, or of some part thereof, or direct some charge on the land to be satisfied out of such proceeds, namely, that a direction is, in its nature, invalid unless it can be enforced, and such a direction as that under consideration cannot be enforced unless the testator create in some other person a "right" which will entitle him to enforce the direction, and the only way in which a testator can create such a right is by making a gift to some one of some portion of the proceeds of the sale directed, or of some interest therein, or by directing some charge upon the land, either created by the will or already existing, to be satisfied out of such proceeds.[1]

410, where the bill was also dismissed, was substantially like Chitty *v.* Parker, except that the bill against the heir was filed by a residuary legatee instead of the next of kin. The case of the next of kin would, however, have been even more hopeless. See next note.

[1] Strange as it may seem, the principle stated in the text finds little formal recognition in the authorities. An idea seems to prevail extensively that a trust created by will, whether for the sale of land or for any other purpose, depends, for its validity, upon nothing but the testator's intention, provided that intention be lawful. It seems to be forgotten that there can be no trust and no trustee without a *cestui que trust*, and that the sole test of the validity of a trust is an ability in some person to enforce it. Thus, in Attorney-General *v.* Lomas, L. R. 9 Exch. 29, it was held that a testamentary trust for the sale of land was valid and binding, though all the gifts of the proceeds of the

For similar reasons to those just stated, a direction by a testator to sell his land, or to purchase land with his money, will not be valid if it be accompanied by an absolute gift of all the proceeds of the sale, or of all the land to be purchased, to a single person who is *sui juris*, for an absolute gift of all the proceeds of a sale of land is also a gift of the land itself,[1] and an absolute gift of all the land to be purchased with certain money is also a gift of the money itself, and hence the legatee, in the one case, becomes the absolute owner both of the land and the proceeds of its sale, and the devisee, in the other case, becomes the absolute owner both of the money and the land to be purchased with it, and it is therefore solely for the one to say whether the land shall be sold, and for the other to say whether land shall be purchased with the money.

So also a direction to sell or purchase land, though originally valid and binding, will cease to be so whenever a single person who is *sui juris* shall become absolutely entitled to all the proceeds of the sale or to all the land to be purchased.

So also if at any time several persons, all of whom are *sui juris*, become absolutely entitled to all the produce of land directed by a testator to be sold, or to all the land directed by him to be purchased, they can make the direction inoperative by uniting in giving notice to the person directed to make the sale or purchase not to do so.

If a testator who directs a sale or purchase of land also disposes of a part of the proceeds of the sale, or of a part of the land to be purchased, or directs a charge on the land to be satisfied out of the proceeds of the sale, the direction to sell or purchase will be valid, as it will then be merely an incident of the gift by which it is followed. So also it will be valid if it be followed by a gift of a limited interest only in a part or in the whole of the proceeds of the sale or of the land to be purchased. So it will if followed by an absolute gift of all the proceeds of the sale, or of all the land to be purchased, subject to the qualifications stated in the two preceding paragraphs.

C. C. Langdell.

CAMBRIDGE, Sept. 13, 1904.

[*To be continued.*]

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sale had failed. The gifts in the will which eventually took effect consisted only of specific and pecuniary legacies. It is true that the pecuniary legacies were charged on the land, including three contingent legacies, namely, one for £3000 and two for £1000 each, but it must be assumed that they had all been paid. See preceding note.

[1] *In re* Daveron, [1893] 3 Chan. 421, 424.